No. 75-659

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In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE LAWSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, George Lawson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing the petitioner to ten years imprisonment upon a jury's verdict of guilty of conspiracy to distribute cocaine.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion of the Court of Appeals was entered August 20, 1975. A timely Petition for Rehearing was denied by order entered October 6, 1975 (Appendix "C").

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1975 (Appendix "A"). A timely Petition for Rehearing was denied on October 6, 1975 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General,

may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohi-

bition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or prop-

erty, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been

first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objection of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

QUESTIONS PRESENTED

1. Where both the district court and the Court of Appeals find multiple violations of the statutory prerequisites for wiretapping, does not 18 U.S.C. §2518 (10)(a) mandate suppression of such wiretapped evidence?

2. Where multiple conspiracies are proven by the government, is there not a prejudicial joinder of defendants requiring separate trials?

3. Did not the district court and the Court of Appeals err in determining that the prosecution was not barred by reason of the prior dismissal of an indictment with prejudice?

4. Was the petitioner denied his right to a speedy trial?

Statement Of The Case

Nature Of The Case

This is an appeal from a judgment of conviction entered upon a jury verdict of guilty on a one-count indictment charging the defendant-appellant, George Lawson, to gether with Ronald Scharf, Bobbie Arnstein and George Matthews, with conspiracy to distribute cocaine, in violation of 21 USC 841 (a)(1) and 846. Matthews pleaded guilty and testified for the government at the joint trial of Lawson, Arnstein and Scharf.

The indictment alleged that pursuant to the conspiracy charged, Lawson by telephone introduced Scharf to Matthews. Scharf and Arnstein thereafter met with Matthews in Florida where Matthews delivered approximately ½ pound of cocaine to Scharf and Arnstein. Scharf and Arnstein thereafter, it is alleged, transported the cocaine to Chicago where it was distributed by Scharf.

Arnstein was sentenced to a provisional sentence of 15 years imprisonment pursuant to the provisions of 18 USC 4208 (b). Pending appeal she committed suicide and the Seventh Circuit Court of Appeals remanded the cause as to her with directions to dismiss the indictment as to her.

Scharf was sentenced to 6 years imprisonment to be followed by a special parole of 3 years, and this petitioner Lawson was sentenced to 10 years imprisonment subject to the provision of 18 USC 4208 (a)(2) to be followed by a special period of parole of 3 years. This appeal follows.

Pre-Trial Motions

Four important matters were raised by pre-trial motion: (1) Lawson's contention that the prosecution under this indictment was barred as to him by reason of the prior dismissal of the preceding indictment and under the double

jeopardy clause of the Fifth Amendment, (2) Lawson's contention that the prosecution was barred for failure to provide him with the speedy trial guaranteed by the Sixth Amendment, (3) The defendants (Lawson, Scharf, and Arnstein) motions to suppress certain evidence garnered by electronic eavesdropping, and (4) the defendants several motions for severance.

(1) Lawson's Contention That The Prosecution Was Barred.

a) In December, 1972, an indictment (72 CR927) was returned charging Lawson, Scharf, Matthews, one Ira Sapstein, and two others with conspiracy to distribute cocaine. That indictment charged substantially the same events as the present indictment except that it did not name Arnstein in any capacity.

Lawson had been answering ready for trial and in July, 1973, filed a written demand for trial. No continuances were at Lawson's instance. The government on September 4, 1973 moved to dismiss the indictment which was granted (and it is contended that said order was "with prejudice"). Thus it is contended that this prosecution is barred by reason of the prior dismissal "with jeopardy."

b) Lawson further contended (see Lawson motion in arrest of judgment) that the prosecution was barred by the double jeopardy clause of the Fifth Amendment since he was tried and convicted under indictment No. 73 CR 389 which said indictment charged a conspiracy to import and distribute cocaine and involved some of the same parties. It was Lawson's contention that if he was a part of a conspiracy it was one continuous conspiracy with him at the center and other people moving in and out and that thus one conviction results in this indictment constituting double jeopardy.

(2) More than six months after the dismissal of 72 CR 927 as set forth above in 1(a), (March 21, 1974), the instant indictment was returned. Lawson moved to dismiss the indictment as being barred, however, he also again demanded immediate trial. Lawson continued his demand for immediate trial through several continuances, none of which were at Lawson's instance.

The cause was finally called for trial on July 16, 1974, and a hearing was held on the defendants' motions to suppress electronic eavesdropping evidence. That afternoon, the trial court apparently concerned only with a possible conflict with its vacation schedule, over Lawson's objection and continued demand for immediate trial, again continued the trial date to October 21, 1974. (Seven months after the return of the instant indictment, twenty-two months after the return of the original indictment 72 CR 927 or fifteen months if the hiatus between the dismissal of 72 CR 927 and the return of 74 CR 243 is not counted). Lawson thus contends that he was clearly denied his constitutional right to a speedy trial and further his rights to due process and equal protection when it is considered that in other federal jurisdictions such delay on the part of the court and government would require dismissal.

(3) All of the defendants joined in motions to suppress evidence derived from electronic eavesdropping had pursuant to purported court authorized wire taps directed against the defendants Lawson, Scharf, Arnstein, and one Sapstein. Although Lawson was never overheard, certain material was introduced against him at trial.

(a) *The Facial Sufficiency of the Wiretap Authorizations*

Pursuant to the Rule 2.04 conference held in this case, the government tendered copies of wiretap authorization

documents to defense counsel prior to trial. It appeared from the face of the documents that Attorney General John Mitchell had delegated his powers to authorize an application for an order permitting electronic surveillance to Henry Peterson, Acting Assistant Attorney General, who had proceeded to authorize the application. In a pretrial motion, defendants challenged the facial sufficiency of these documents on the ground that the relevant legislation nowhere states that such powers may be exercised by an *Acting* Assistant Attorney General. The Court denied the motion to suppress.

(b) *Failure to Serve an Inventory*

No inventory of the fact, dates or conduct of electronic surveillance was ever served on Lawson or the other defendants. After the indictment, in April, 1974, the government tendered to certain counsel transcripts of intercepted telephone conversations in which their clients were allegedly involved.

(c) *The Broken Seals*

On July 12, the Court granted the government's motion to break the seals on three boxes containing the original tape recordings of the telephone conversations intercepted in November, 1971, so that the government could make copies of three tapes, the originals of which they had lost or misplaced. The Court ordered that the boxes be opened and resealed in the presence of defense counsel. (R. 114.)

The boxes were stored in the office of Agent Aldo Aurilio in the offices of the Drug Enforcement Administration. When the boxes were produced, it was noticed that two of the boxes (GX B and C.) the seals bearing Judge Richard B. Austin's signature and the date, January 21, 1972, were

broken. (July 16, Tr. 22-26.)* All the tapes the government used as evidence at trial were in the box designated as Government Exhibit C; the seal on Government Exhibit C was broken through Judge Austin's signature, the box could be opened and its contents, the tapes packaged in lock-seal evidence envelopes, removed and replaced. (Tr. 725-727; July 16, Tr. 23-26.)

Agent Aldo Aurilio was called to testify at a pretrial hearing on the condition of the boxes and testified that he noticed the broken seals for the first time on July 12, and that he never moved or handled the boxes or broke the seals. (Aurilio, Tr. 32-33.) He testified that he didn't know when or how the seals were broken. (Tr. 50.) The Court found that ". . . the Government is not in a position to explain how it occurred" and Mr. Roller stated, "We have no explanation for this but merely conjecture . . . as to how they could possibly have been broken." (Tr. 52, 54.)

Stating that the boxes could have been damaged by being near a radiator (Agent Aurilio had testified that they were stacked on an air-conditioning register between April, 1974 and July, (Tr. 59), and that he found no evidence of tampering, the Court denied the motion to suppress. (Tr. 65-66.) It should be noted however that Government Exhibit B (with a broken seal) was stored on top of Government Exhibit C and Government Exhibit A (with seals intact), like Exhibit C (with seals broken) was directly on the register. (Aurilio, Tr. 59.)

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* Defense Exhibits 6 and 7 are photographs of Government Exhibit C; Defense Exhibit 8 pictures Government Exhibit B; Government Exhibit A, the box on which the seals appeared to be intact. (Tr. 816-817.)

(d) *The Delay in Presenting the Tapes to the Judge for Sealing*

The broken seals on the boxes were signed and dated January 21, 1972, fifty-seven days after the expiration of the period of the order on November 25. (July 16, Tr. 49, 66-67.) The trial court overruled the motion to suppress, despite the requirement of 18 U.S.C. §2518 (8)(a) that the tapes be presented to the Judge who issued the order for sealing "[I]mmediately upon the expiration of the period of the order. . . ."

(e) *Violation of the Statutory Requirement to Present Tapes to Judge Issuing Order*

The trial court denied the motion to suppress despite the fact that it was clear from the record the Judge Robson issued the orders purportedly authorizing the wire taps and that the tapes were subsequently returned to Judge Austin for sealing.

(4) *The Motions For Severance*

Each of the defendants moved for severance for trial from the other defendants Lawson contends that he was irrevocably prejudiced by admission of voluminous evidence against his co-defendants which was clearly irrelevant and immaterial as to him.

The Trial

In this jury trial which lasted some eight (8) days during which the government presented some twelve (12) witnesses and recalled two witnesses for additional testimony, played numerous tapes of wire-tapped conversations and built a total transcript of over 1350 pages, only two witnesses testified about the defendant Lawson.

George Matthews was the government's chief witness. He testified that in August, 1971, he had a large supply of cocaine and he wished to dispose of it. Matthews called

Lawson who was in Jamaica, told him of his problem and asked Lawson if he knew of any potential customers. (Tr. 20-38)

Matthews sent a sample of the cocaine to Lawson through Lawson's girl friend Myrna Pierce, an airline stewardess, who also testified for the government and stated that she picked up cocaine from Matthews and took it back to Lawson in Jamaica. (Tr. 394-405)

In September, 1971, Lawson phoned Matthews and gave him the names of some potential customers and asked Matthews if he (Lawson) could give someone Matthews phone number. After an affirmative answer Lawson told Matthews that he would be hearing from a person named "Ronnie" from Chicago. (Tr. 40)

This is the last testimony concerning Lawson.

Shortly thereafter the defendant Ronald Scharf called Matthews and thereafter, in early September, he and one Ira Sapstein went to Matthews home in Miami, obtained a sample of cocaine and promised to return "to conclude a deal" (Tr. 41-46, 54-56)

While in Florida, Scharf gave Matthews two telephone numbers where he could be reached in Chicago, one of which Scharf said was the number of the Playboy Mansion where he was living with Bobbie Arnstein, with whom, Matthews testified, Scharf said he could leave messages for him. (Tr. 56-58.)

Matthews further testified that they discussed his interest in the rock music business and Scharf said that he, Scharf, had access to the Playboy Jet which Matthews might use to transport rock groups on tour. The government introduced their lengthy conversation, the conclusion of which was Scharf's call to Ms. Arnstein who said she

did not have access to the plane. (Tr. 78-82.) The defense objected and moved to strike this testimony on a number of occasions, but the motions were denied. (Tr. 78-82, 857-859, See also Tr. 1167-71.)

Matthews testified that prior to the telephone call to Ms. Arnstein, he invited Scharf to bring "his lady" for a weekend. Scharf asked Ms. Arnstein when he spoke to her and she accepted. (Tr. 81.)

On the following Friday evening, September 10, 1971, Scharf accompanied by Ms. Arnstein, visited Matthews and his wife in Miami. (Matthews, Tr. 81.) That evening, on Scharf's request, they partook of cocaine, and sometime during the course of the evening, Scharf told Matthews he would take a half a pound of cocaine. (Tr. 87-89.)

On the following day, Ira Sapstein arrived. That afternoon, Matthews went out to procure some cocaine for Scharf, and Scharf and Sapstein went out to purchase lactose to "hit" or "cut" it. Ms. Arnstein was not present during any of these events. (Matthews, Tr. 91-96.)

Later, Matthews, Scharf and Ms. Arnstein "snorted" some of the new cocaine. At some point Matthews asked Scharf to put the cocaine away. (Tr. 96-98.) It was then that he implicated Ms. Arnstein (Tr. 98):

> "Ronnie handed Bobbie the package and told her to put it away. She in fact put it in her, what I call a model's carry-all or make-up carry-all or bag, or whatever."

Matthews testified that Sapstein was not present when he gave Scharf and Arnstein the cocaine. (Tr. 221.) However, in early 1972, when he gave his long statement to the government, he had unequivocally stated that he gave the cocaine to Scharf and Sapstein and added, with what appears to have been prompting by Agent Aurilio, Bobbie Arnstein.

Shortly thereafter, Scharf announced "that they were going to have to go back before they planned to." Sapstein and Ms. Arnstein went out to dinner and Matthews took them to the airport. (Tr. 98.) That night, Matthews testified Scharf called him from Chicago and told him "that he had stashed [the cocaine] in the Playboy limousine." (Tr. 100.)

On Monday, September 13, Matthews tried a number of times to contact Scharf with no success. He called Ms. Arnstein's number, and when she told him Scharf wasn't there, he said he would call back. When he did, he reached Ms. Arnstein in her office and testified to a conversation as follows (Tr. 101-102):

> "She then told me that Ronnie was still out and I told her that what I wanted to do was to fly from Houston to Chicago to pick up some money on my way back to Miami. She told me, she said, 'Well, I don't know'—I said, 'I need to talk to Ronnie about that.'
>
> "She said, 'Well, Ronnie isn't here but I will try to get a hold of him.' So, she put me on hold and she told—as I say, she put me on hold and then she came back on the line and told me that Ronnie would be, that it would be impossible for Ronnie to meet me at the airport with any money but that I would be hearing from Ronnie shortly.
>
> "I thanked her very much and that terminated the conversation."

Government agents testified that on that Monday, Scharf sold a half pound of cocaine to "Mickey" a government informant. The agents testified that Scharf entered and exited the Playboy Mansion, 1340 North State Parkway, on a number of occasions between 10:55 a.m., when he was first observed standing on the corner of State and Division Streets to late that evening, when he was last observed entering 1340. No agent observed Lawson on that date. (Tr. 548-549, 602, 616, 626.)

There was evidence that in the days following September 13, that Scharf told Matthews that Scharf's customer, Mickey was dissatisfied with the quality of the cocaine. (Matthews, Tr. 102-105.)

Approximately one week later, Matthews and his wife drove to Chicago. En route they called Ms. Arnstein and asked her if she could make a reservation for them at the Playboy Towers. She did so. On the afternoon of their arrival, they tried to reach Scharf at Ira Sapstein's number and instead spoke to Sapstein, who visited them at the hotel. (Tr. 105-106.)

The next day Scharf invited Matthews and his wife to have lunch at the Playboy Mansion. Ms. Arnstein was not present but Scharf showed them around her apartment. Arrangements were made to have lunch delivered and Scharf produced some cocaine which he said was "from the original stash'." Matthews testified that the cocaine appeared to have been in a freezer, but there was no testimony concerning where Scharf had obtained it. (Matthews, Tr. 106-108.)

Later Ms. Arnstein arrived at her apartment, accompanied "by a young lady." According to Matthews, the young lady left, and Ms. Arnstein remained. At some point Scharf "laid out" the cocaine and at some point, lunch arrived. (Tr. 108-110.) Matthews testified (Tr. 110):

> "I asked Ronnie when I was going to get some money. He told me he was making arrangements to get me some."

Matthews testified that Ms. Arnstein left while he, his wife and Scharf remained. (Tr. 110.)

In November, Agent Aurilio, using the alias "Steve Ferrari," and Mickey arranged with Scharf to go to Florida to meet Matthews. In conversations at Matthews'

home, Mickey complained about the quality of the cocaine he had purchased from Scharf, and Matthews and his wife complained that they "did not like the way Ronnie or Ira were taking care of business." (Tr. 121; Tr. 451-453, 471.) No narcotics changed hands. (Tr. 186.)

On November 11, 1971, the government began electronic surveillance of Ira Sapstein's telephones. (Tr. 715.) During the period of surveillance, Scharf was heard telling "Robin" that he had been living at the Playboy Mansion (GX 8 T); Matthews and Sapstein were overheard discussing Matthews' need for money and a call he had received from "Mick" (GX 9 T-1); Scharf and Mickey were overheard discussing Mickey's impending trip to Florida (GX 9 T-2; 11 T-2); Sapstein was overheard informing Matthews of Mickey's flight number (GX 11, T-3); Scharf and Sapstein were overheard describing for Mickey the car Matthews would be driving when he picked Mickey and "Steve" up at the airport, and learning from Mickey what he was wearing and where in the airport he would wait for Matthews (GX 12 T-1); and Sapstein was overheard communicating to Matthews the information given him by Mickey. (GX 12 T-2.)

The government introduced two conversations in which Ms. Arnstein participated. The conversations contained discussion about personal use of drugs, including drugs other than cocaine, and of Ms. Arnstein's forthcoming trip to California on November 18, where she planned to have a suspected breast tumor examined by a surgeon.

Although the eavesdropping order was directed at Scharf, Sapstein, and Lawson, Lawson was never intercepted, nor was his name even mentioned in any conversations. The government never served an inventory of the interceptions on Lawson.

The Verdict, Post-Trial Motions and Sentencing

The jury returned a verdict of guilty as to all defendants on October 30. On November 26, the Court denied defendants motions for judgment of acquittal, for a new trial and to arrest judgment; at that time, Lawson was sentenced to ten (10) years in prison subject to the provisions of 18 U.S.C. §4208(a)(2). (Nov. 26, Tr. 7, 22.)

Lawson then appealed to the Seventh Circuit Court of Appeals which affirmed the conviction by unpublished opinion dated August 20, 1975 (Appendix "A") and thereafter denied his timely petition for rehearing and suggestion for rehearing "en banc" on October 6, 1975 (Appendix "C").

REASONS FOR GRANTING THE WRIT

The Petitioner believes that this Court must resolve the issue of the necessity of strict compliance with Title III requirements for wiretapping and determine that the statute mandates suppression where there is less than strict compliance.

The Courts below clearly did not follow this Court's and other Circuit Courts' decisions regarding misjoinder of defendants where multiple conspiracies are proved where only one conspiracy had been charged.

The Courts below also clearly failed to follow this Court's and other Circuit Courts decisions regarding speedy trial and bar by reason of prior dismissal.

ARGUMENT

1. THE TAPES OF THE WIRE-TAPPED PHONE CONVERSATIONS SHOULD HAVE BEEN SUPPRESSED BECAUSE OF THE MULTIPLE FAILURES OF THE GOVERNMENT TO COMPLY WITH STATUTORY REQUIREMENTS.

The district court and the Seventh Circuit Court of Appeals both found multiple failures of the government to comply with the statutory requirements of 18 U.S.C. §2516 and §2518 prerequisites to wiretapping.

In fact, an examination of the Seventh Circuit's opinion (Appendix "A") will show that the court order authorizing the wiretaps was insufficient on its face, that there was an inordinate and unexplained delay in presenting the wiretap evidence for sealing, that when it was presented it was presented to a judge different than the authorizing

judge, that when the tapes were brought to court the seals were broken and the government had no explanation, and that the government never served an inventory as required by statute. Yet, despite all of these failures, the Courts found a lack of prejudice to the defendants and thus refused suppression.

This Court stated in *Gelbard* v. *United States*, 408 U.S. 41, 47, 92 S.Ct. 2357, 33 L.Ed. 2d 179, that the "fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance" by its enactment of Title III "is strictly to limit the employment of those techniques of acquiring information."

It is argued that failure by the government to strictly comply with the statute should mandate suppression and this Court should so decide.

2. THE EVIDENCE PROVED MULTIPLE CONSPIRACIES RATHER THAN ONE CONSPIRACY AS CHARGED, AND IN ANY EVENT THERE WAS A PREJUDICIAL JOINDER OF DEFENDANTS.

It is argued that if in fact a conspiracy was proved by the government in this case, there were many conspiracies proven, and thus there was an improper joinder of defendants. See *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557; and *United States* v. *Varelli*, 7 Cir., 407 F. 2d 735.

If the evidence of the government is accepted in the light most favorable to the government, what was actually proved?

It could be said that there was proven a conspiracy between Matthews, Lawson, Pierce, Scharf, Sapstein, and Arnstein for Lawson to introduce Scharf and Sapstein to Matthews for the purpose of Matthews transfering cocaine

to Scharf, Sapstein, and Arnstein. There also appears to be a conspiracy between Matthews, Scharf, Sapstein, and Arnstein to transfer cocaine to Chicago for the purpose of merchandising said cocaine there. The wire-tapped conversations also seem to prove a conspiracy between Scharf, Sapstein, and Arnstein to merchandise heroin, amphetamines, and other dangerous drugs in Chicago. (See Tr. 801, GX 11-T-1, Tr. 805, GX 8-T) and also a conspiracy between Matthews, Scharf, Sapstein, Mickey, and Steve to transfer cocaine (Tr. 798, GX 9-T-1; Tr. 799, GX 9-T-2; Tr. 803, GX 11-T-2; Tr. 803, GX 11-T-3) and further there appears to be a conspiracy between Scharf and Mickey and others to distribute cocaine in Chicago (Tr. 419-450, 556-626).

The Supreme Court in *Kotteakos* at 328 U.S. 755, 90 L. Ed. 1561, states:

> "The Court of Appeals aptly drew analogy in the comment, 'Thieves who dispose of their loot to a single receiver—a single fence—do not by that fact alone become confederates. . . .' "

The reverse of that analogy is true here. The fact that the parties came together at one point and one supply of cocaine (if in fact there was only a single source of cocaine) was used does not make the parties co-conspirators for all purposes. Here, there may be an initial conspiracy between Matthews, Lawson, Scharf, Sapstein, and maybe Arnstein for Lawson to introduce Matthews, the supplier, to Scharf, Sapstein, and Arnstein, the buyers, for the purpose of the buyers purchasing cocaine from the seller Matthews, and included in that conspiracy would probably be the transference of cocaine from Matthews via Pierce to Lawson. However, the evidence fails to show any con-

nection between Lawson and Pierce and the subsequent conspiracies between Matthews, Scharf, Sapstein, and Arnstein to Merchandise cocaine in Chicago, or between Scharf, Sapstein, Arnstein and others to merchandise heroin, amphetamines, and other dangerous drugs in Chicago, or between Scharf and Mickey to transfer cocaine in Chicago, or between Matthews, Scharf, Sapstein, Mickey, and Steve to introduce Mickey and Steve to Matthews for the purpose of Matthews selling cocaine to Mickey and Steve.

It might also be noted that the apparently irrelevant evidence that Scharf was living with Arnstein in an illicit sexual relationship at the Playboy Mansion and that Scharf had sexual relations with other women and that Scharf and Arnstein used cocaine as well as other drugs (Tr. 797, 806, GX 8-T; 9-T-1, 9-T-2; 10-T; 11-T-1; 11-T-2; 11-T-3; 12-T-1; 12-T-2) was greatly prejudicial not only to Scharf and Arnstein, but especially to Lawson who was otherwise totally unrelated to these incidents. In fact, much of the evidence played to the jury from the wire-taps was evidence of other crimes than the conspiracy charged in the indictment and clearly they did not relate to Lawson.

The Seventh Circuit Court of Appeals said in *Varelli* at 407 F. 2d 743:

> ". . . a single act performed with parties who are involved in more than one conspiracy may be insufficient to draw an inference of the existence of an agreement between the parties in the case of multiple conspiracies. Knowledge of the existence of the other parties to the conspiracies is insufficient. While the crime of conspiracy is completed as soon as the unlawful agreement is formed, . . . it must be shown that this agreement was made prior to or during the consummation of the single act."

Once multiple conspiracies are established, the question becomes whether there was improper joinder. All defendants moved for separate trials (R. 21, 31, 43, 66) renewed their motions at trial (e.g. Tr. 861) because of the prejudicial nature of the evidence of the other events.

The Supreme Court said in *Kotteakos* at 328 U.S. 774, 90 L.Ed. 1571:

> "The danger of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

The convictions of the defendants should be reversed because of the improper joinder of defendants.

3. THE DISMISSAL OF INDICTMENT 72 CR 927 WAS WITH PREJUDICE AND THUS THE PROSECUTION OF THESE DEFENDANTS UNDER THE SUPERCEDING INDICTMENT HEREIN WAS BARRED.

Indictment 72 CR 927 was a one-count indictment charging the defendants Lawson and Scharf and other persons with conspiracy to distribute cocaine. That indictment was returned on December 13, 1972. During the spring of 1973 and into the summer of 1973, Lawson and other defendants answered ready for trial. In fact during August, 1973, Lawson filed a written demand for immediate trial.

On September 4, 1973, the cause having been continued numerous times on the motion of the government, the parties appeared before Judge Bernard M. Decker and at that time the government moved to dismiss the indictment as to Lawson, Scharf, and certain others but not as to all defendants. The following colloquy took place:

• • •

"Mr. Massey (Assistant United States Attorney): Yes. We have received permission from Washington to proceed with dismissal and that's what we have done with this motion.

The Court: That takes care of all of these gentlemen, does it?

Mr. Massey: Yes.

The Court: Well, I mean, you can't—you don't want to object to it, do you?

Mr. Walsh (Lawson's Attorney): Well, if it is with prejudice.

The Court: Well, have you ever heard of a dismissal by the Government without it, I mean, in a situation like this?

Mr. Walsh: Well, yes, if they are trying to reindict later.

The Court: Well, I—

Mr. Massey: I think that this is a question that should be raised if and when that event comes up, not at this time, your Honor.

The Court: Well, I don't think that I can preclude them, can I, from dismissing?

Mr. Walsh: I don't want you to either, Judge.

The Court: No, I don't think that you do either. The motion is granted."

• • •

(Transcript Attached to Lawson's Motion to Dismiss, R. 23)

It is the defendants' contention that the clear import to all parties including the Court was that the dismissal of indictment 72 CR 927 on September 4, 1973, was the final termination of the prosecution and that the dismissal was "with prejudice."

Approximately seven months later, i.e., March 21, 1974, these defendants were indicted in indictment 74 CR 243 (R. 1) a one-count indictment charging essentially the

same offense as 72 CR 927 and designated by the government as being a superseding indictment to 72 CR 927. (R. 2)

The United States Supreme Court and at least the DC Circuit Court of Appeals have held that the dismissal of an indictment with prejudice constitutes an adjudication which bars subsequent prosecution for the same offense. *United States* v. *Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161; and *White* v. *United States*, D.C. Cir., 1967, 377 F.2d 948.

At 377 F.2d 949 the D.C. Circuit stated:

> "Upon consideration of the record relating to the dismissal we conclude it was with prejudice.
>
> • • •
>
> The dismissal with prejudice constituted an adjudication which barred another prosecution for the same offense."

The convictions herein should be reversed.

4. LAWSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

This prosecution actually began with the return of indictment 72 CR 927. The offense and transactions charged are the same as in the instant indictment 74 CR 243. (R. 1, DX 10) The sole differences are the failure to charge some of the people named in 72 CR 927 in 74 CR 243 and the addition of one defendant not previously charged—Bobbie Arnstein.

Indictment 72 CR 927 was returned on December 13, 1972. Lawson was ready for trial shortly thereafter and all continuances were at the request of the government from the Spring of 1973 to the dismissal of the indictment on September 4, 1973. In August, 1973, in fact, Lawson

filed a written demand for immediate trial. On September 4, 1973, in order to avoid dismissal by the Court or being forced to trial, the government dismissed the indictment as to these defendants and certain others. (See Argument 3) Approximately 9 months had passed from the return of the indictment until its dismissal.

Approximately 7 months thereafter, the present indictment 74 CR 243 was returned on March 21, 1974. (R. 1) Again Lawson demanded trial although he also moved to dismiss the indictment as being barred. (R. 23) The cause was continued from time to time at the governments or courts instance and eventually called for trial on July 16, 1974 (some 4 months after the return of 74 CR 243, but approximately 19½ months after the initial commencement of the prosecution).

On July 16, 1974, all parties were present and ready to proceed to trial. A hearing was had on the defendants motions to suppress and prior to the noón recess the cause was ready to proceed to trial. However, following the re turn of the parties to court after lunch there was colloquy concerning the expected length of the trial and although the defendant Lawson again objected to any continuance and demanded an immediate trial (Tr. 7/16/74—p. 89), Judge Decker, apparently with more concern about his vacation plans than the constitutional rights of a criminal defendant (Tr. 85, 96) continued the case for an additional 3 months to October 21, 1974.

Lawson filed a motion to dismiss the indictment herein alleging a denial of a speedy trial, alleged prejudice to himself, and asked for a hearing. (R. 23) The trial court denied the motion without hearing (R. 89) apparently feeling that there was no showing of prejudice and thus there was no constitutional violation.

However, the United States Supreme Court in its most recent opinion discussing the factors involved in determining whether there has been a violation of the Constitutional right to a speedy trial unanimously stated:

• • •

> "*Barker* v. *Wingo* (407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182) expressly rejected the motion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial:
>
> > 'We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in speedy trial is specifically affirmed in the Constitution.'
>
> • • •
>
> In the face of petitioner's repeated demands, did the . . . [government] . . . discharge its "constitutional duty to make a diligent good-faith effort to bring him to trial?"

Moore v. *Arizona*, 414 U.S. 25, 26, 38 L.Ed. 2d 183, 185-186, 94 S.Ct. 188.

The Court went on to say at 414 U.S. 26-27, 38 L.Ed. 2d 186:

> "Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to the pos-

sible prejudice to his defense in those proceedings. Inordinate delay,

> 'wholly aside from possible prejudice to a defense on the merits, may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . . . These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty."

Lawson suffered all of the prejudices described in *Moore*. In addition, because of the timing of this trial he was forced to forego his right to testify because of the trial court's denial of his motion to suppress the use of a prior conviction for impeachment. (R. 112, 115, Tr. 1072)

Lawson argues that clearly there was an inordinate delay in this case, and this is so no matter what time frame is used—22 months from the return of 72 CR 927, 15 months from the return of 72 CR 927 not counting the seven months between the dismissal of 73 CR 927 and the return of 74 CR 243, or seven months from the return of 74 CR 243.

In respect to the latter time period, it should be noted that under the rules prevalent in the Second Circuit, the trial must take place within six months. (See the "Second Circuit Rules Regarding Prompt Disposition Of Criminal Cases")

Lawson has certainly been denied his constitutional right to equal protection of the laws as contained in the Fifth Amendment if it is a lack of a speedy trial for a delay of

six months in the Second Circuit but not such a denial for a delay of at least seven months and actually 22 months in the Seventh Circuit. Certainly, the trial courts desire to maintain its vacation schedule is insufficient reason to delay Lawson's trial.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November, 1975

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
(Argued June 2, 1975)

August 20, 1975
Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD P. MOORE, *Senior Circuit Judge* *
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE LAWSON and RONALD SCHARF,
Defendants-Appellants.

Nos. 74-1982, 74-1996

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.
No. 74 Cr. 243
BERNARD DECKER, *Judge*

ORDER

George Lawson and Ronald Scharf appeal from judgments of conviction following a jury trial before Judge Bernard Decker, Northern District of Illinois, on a one count indictment charging Lawson and Scharf as well as Bobbie Arnstein and George Matthews with conspiracy to

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* Honorable Leonard P. Moore, Senior Circuit Judge of the U.S. Court of Appeals for the Second Circut, sitting by designation.

distribute cocaine in violation of 21 U.S.C. §§841(a)(1) and 846. Matthews pleaded guilty and testified for the government at the joint trial of Lawson, Arnstein [1] and Scharf. Lawson and Scharf raise a plethora of issues on appeal including lack of speedy trial; a bar to prosecution from a prior dismissal of an indictment with prejudice; defective indictment due to reference to cocaine rather than coca leaves; statutory misclassification of cocaine as a narcotic; improprieties in wiretap procedure requiring suppression; proof of multiple conspiracies rather than a single one; a double jeopardy problem in terms of a relationship between a prior conspiracy for which Lawson was convicted and the instant conspiracy; improper admission of "business records"; prejudicial conduct of trial judge; and the giving of a portion of the charge in Lawson's absence.

Although we do not discuss each issue below, we have considered each of the issues raised very carefully and we affirm the convictions.

The evidence at trial indicated that Lawson who was residing in Jamaica, B.W.I., acted as a go-between in getting Scharf, a potential Chicago purchaser-distributor of cocaine, into contact with Matthews who lived in Florida and had large quantities of cocaine for sale.

Lawson, a resident of Jamaica, sent his girlfriend to Matthews' Miami home in August 1971 to obtain cocaine and bring it to Jamaica. Lawson then telephoned Matthews and indicated that he knew several people in the United States who would be interested in purchasing cocaine. Matthews gave Lawson an unpublished phone number to be given to "Ronnie" from Chicago. Following a phone contact, Ronald Scharf and Ira Sapstein flew to Miami to

see Matthews, where the three of them sampled cocaine. Scharf left for Chicago with an ounce and a half sample having given Matthews two phone numbers where he could be reached, one of them being a number for the Playboy Mansion. Scharf returned to Miami a few days later but no transaction occurred due to Scharf's financial inability. On September 10, 1971 Scharf visited Matthews, accompanied by Bobbie Arnstein, and in the course of the visit accepted a half-pound of cocaine. On September 13 an informant carrying $6,250 in government funds purchased some cocaine from Scharf, while drug enforcement agents watched, although they were unable to see the exchange of money for the white crystalline powder.

On September 14, Lawson phoned Matthews to inquire when he (Lawson) would be paid for the Scharf-Matthews transaction.

About a week later Matthews and his wife drove to Chicago where Matthews and Scharf discussed payment by Scharf to Matthews for the half pound at the Arnstein apartment.

Scharf arranged a purchase with Matthews in November for the informant and an undercover agent. In the meantime Scharf's phone had been tapped. Matthews was arrested when he attempted to complete a cocaine sale with the undercover agent.

Appellants have raised many issues involving the obtaining and processing of wiretap evidence and the conduct of the trial. Before discussing the claims based on governmental noncompliance with the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 we will consider a few of appellants' arguments with respect to alleged faulty trial procedures.

LACK OF SPEEDY TRIAL

Lawson and Scharf were both named in an indictment in this case in December 1972 and they claim that they were deprived of their constitutional right to speedy trial by the twenty-two month pre-trial delay from December 1972 to October 1974. The right of a defendant to a speedy trial is not absolute and exists in a balance with the right of the public to have offenders prosecuted. The Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972) has indicated that where a delay has occurred a court must consider four factors—(1) the length of delay; (2) the reasons for delay; (3) defendant's requests for trial; and (4) whether or not defendant was prejudiced by the delay—to determine whether a defendant has been denied his constitutional right to speedy trial. In this case, considering these factors, we find that Lawson and Scharf did not suffer a deprivation of their constitutional speedy trial right.

Trial was originally scheduled for June 1973 but the government's chief witness Matthews disappeared before trial. In August 1973 Lawson filed a demand for immediate trial. In September 1973 due to Matthews' continuing unavailability, the government moved to dismiss the original indictment. Matthews was located in October 1973 and the second indictment was returned in March 1974. The case was set for trial for July 1974 but was continued until October 1974 because of the calendar situation for a trial of the length estimated by counsel.

In *Barker* v. *Wingo, supra,* reaffirmed in *Moore* v. *Arizona*, 414 U.S. 25 (1973), the Supreme Court indicated that we must examine and balance the above-mentioned factors. We, therefore, turn to the reasons for the delay.

The initial delay in the summer of 1973 was the result of Matthews' unavailability. There has been no indication that the government did not make a good faith effort to locate the missing witness. *See also Barker* v. *Wingo*, 407 U.S. at 531; *United States* v. *DeTienne*, 468 F.2d 151 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973). Once Matthews was located in October he gave further information necessitating additional investigation by the government. This resulted in another delay before the new indictment of March 1974 was returned.

From that point until July 1974 various pretrial motions occupied the attention of defense counsel, the government, and the court. During a colloquy about scheduling on July 16, 1974 Judge Decker informed counsel that he would be attending a judicial administration conference on July 27. Defense counsel indicated that they did not believe the trial could be completed by then. Since counsel for Arnstein was unavailable in August and Judge Decker had another lengthy trial scheduled in September, trial was set for October 21, 1974. Based upon the record in this case, we find that the defendants were not deprived of a speedy trial.

DOUBLE JEOPARDY

Lawson claims that his conviction in this case violates the constitutional protection against double jeopardy due to an alleged relationship between the instant conspiracy and the conspiracy charged in *United States* v. *Lawson*, 507 F.2d 433 (7th Cir. 1974). An examination of the facts of the earlier case reveals that the two conspiracies were different and prosecution for each is entirely proper. While there are some similarities between the two conspiracies, the parties involved, the mode of distribution, and Lawson's role were different in each and his double

jeopardy claim must fail. *See United States* v. *Bargie*, 433 F.2d 984 (2d Cir. 1970), *cert. denied*, 401 U.S. 975 (1971), *Cf. Dryden* v. *United States*, 403 F.2d 1008, 1009, (5th Cir. 1968); *United States* v. *Edwards*, 366 F.2d 853, 872 (2d Cir. 1966), *cert. denied*, 386 U.S. 919 (1967).

THE WIRETAP EVIDENCE

Congress has specified the procedure for securing judicial authority to intercept wire communications in the investigation of certain serious offenses in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520. 18 U.S.C. §2516(1) provides that the Attorney General or a specially designated Assistant Attorney General must authorize every wiretap application submitted for approval to the district court.[2] The district court must make certain findings before authorizing interceptions including (1) the lack of other investigative techniques and (2) the existence of probable cause.[3] The law enforcement agency is required to produce the tapes to the authorizing judge for sealing once the order expires and the statute provides for official control of the custody of any recordings or tapes until the time of trial.[4] Notification to those subject to the surveillance is required prior to use of the tap evidence at trial.[5] Suppression of evidence derived from electronic surveillance is required by the statute when communication has been unlawfully intercepted or when approval of the wiretap order is insufficient on its face.[6]

Appellants moved to suppress the wiretap evidence prior to and at trial, alleging violations of all of the provisions referred to above. The trial judge denied the suppression motions and admitted the evidence. We must determine whether the government failures to comply with

statutory provisions are of the type which ". . . require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano*, 416 U.S. 505 at 527 (1974).

Appellants have raised the question of whether wiretap authorities signed by an acting Assistant Attorney General, not specially authorized to approve electronic surveillance under 18 U.S.C. §2516(1), must be suppressed as facially insufficient under 18 U.S.C. §2518(10)(a)(ii). *See* notes 2 and 6 *supra*.

We are not dealing with a claim that the wiretap application *was not authorized* by the Attorney General or an Assistant Attorney General because the defendants have not contested government affidavits indicating that Attorney General John Mitchell himself *authorized* the surveillance. Rather, the attack is on the facial sufficiency of the affidavit because the authorization order *was signed* by Acting Assistant Attorney General Henry Petersen. The order was signed by Petersen in November 1971 approximately two months prior to Senate confirmation of his appointment. We agree with the holding of the Third Circuit in *United States of America* v. *Acon*, Criminal No. 72-193, decided March 6, 1975 where under similar factual circumstances the court found the facial insufficiency of an authorization order signed by Acting Assistant Attorney General Petersen where the Attorney General himself had approved the application too technical to require suppression. *See United States* v. *Chavez*, 416 U.S. 562 (1974).

See also United States v. *Robertson,* 504 F.2d 289 (5th Cir. 1974); *United States* v. *Boone,* 348 F.Supp. 168 (E.D. Va., 1972) *aff'd mem.,* 499 F.2d 551 (4th Cir. 1974). In *Chavez* the Supreme Court distinguished the requirement of a properly authorized order from the requirement of identifying the authorizing official.[7] Because the latter requirement was merely designed to fix responsibility, it does not establish a substantive role and as a technical violation does not require suppression. We do not suggest that the government is free to pick and choose which technical requirements to comply with and which to flout; rather we believe that the government should in the future comply with all the requirements which Congress set up for use of such an unusual investigative technique. We merely find that the drastic remedy of suppression is not required where this technical violation occurs and the general purpose of the statute has been preserved. In this instance the purpose of the statute was carried out inasmuch as the Attorney General himself authorized the order in fact.

Appellants also challenge the sufficiency of the order's underlying affidavit as to probable cause. *See* note 3 *supra.* We agree with the conclusion of Chief Judge Robson, who ordered the wiretap, that there was probable cause to believe that defendants' drug-related conversations would be intercepted through surveillance of the named telephone.

Chief Judge Robson issued the wiretap order, covering two telephones listed in the name of Scharf's roommate Ira Sapstein, on November 11, 1971 for a fifteen day period expiring November 26, 1971. At the time he had before him a wiretap authorization letter of Acting Assistant Attorney General Petersen, an application for wire-

tap authorization order signed by a Special Assistant United States Attorney, and an affidavit in support of that application given by Agent Aurilio one of the agents of the Bureau of Narcotics and Dangerous Drugs who had been engaged in surveillance and undercover work on this case.

Aurilio's affidavit set out detailed information garnered from a reliable informant and corroborated by BNDD agents' surveillance and independent investigation. This informant was introduced to Scharf in early September 1971 by a mutual acquaintance for the purpose of obtaining cocaine. According to the agent's affidavit, Scharf told the informant that he could supply unlimited cocaine and he gave Scharf a sample. A week later the informant purchased a half-pound of cocaine from Scharf in a transaction funded and surveilled by BNDD agents who were unable to see the actual transfer. At this time, a telephone relationship between Scharf and the informant was established, and, in response to a suggestion of the informant, Scharf refused to meet the informant's boss. Between September 15 and October 15, Scharf and the informant maintained telephone contact, on one of Sapstein's phones, involving a pending sale of narcotics which included an extra measure to make up for the poorer quality of the first transaction as compared with the sample. Scharf told the informant that his source was a man named George in Jamaica. BNDD agents checked the phone records and learned that 23 calls were made from the Sapstein phone to a George Lawson in Jamaica. The informant also told the agents that Scharf was reorganizing his business after November 2, 1971 and later he gave to agents the two new non-published numbers which had been installed at the Scharf-Sapstein apartment and which were provided to him by Scharf. We believe that a reasonable man would

conclude that Scharf was using the two non-published numbers to arrange for the importation and distribution of cocaine. *See United States* v. *James*, 494 F.2d 1007, 1015 (D.C. Cir. 1974) for a probable cause finding based on a similar fact pattern.

Appellants also argue that suppression was required because of deficiencies with respect to the requirements of §§2518(1)(c) and (3)(c) of a statement in the affidavit and a determination by the Court that other investigative procedures are unavailable. As the Supreme Court noted in *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974) these requirements are "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." In this instance it was clear from the agent's affidavit that other investigatory techniques were inadequate inasmuch as surveillance had not been totally successful and since Scharf had exhibited such reluctance to meet with the informer's boss. Furthermore, in view of the fact that Scharf's source was in Jamaica, wiretapping was the only feasible means suitable to determine delivery techniques, times, and places. *See United States* v. *James*, *supra*. We hold that the judge had an adequate basis on which to determine the unavailability of other investigative procedures and that he was able to make that determination.

Finally, appellants challenge the government's compliance with statutory provisions involved in four aspects of post-wiretap procedures: (1) the tapes were not "immediately" sealed; (2) they were sealed under the directions of Judge Austin rather than Chief Judge Robson who had granted the authorization order; (3) some of the seals affixed in Judge Austin's presence were broken prior to trial; and (4) delay in providing an inventory of the tapes to Scharf and failure to provide an inventory to Lawson, the other party named in the wiretap warrant.

The government has suggested that the post-interception sealing violations by their nature might not be cognizable under the 18 U.S.C. §2518(10)(a)(i) suppression section. See note 6 *supra*. We do not agree and we hold that the post-interception violations must also be scrutinized to determine if the failures to satisfy the statutory requirements directly and substantially affect the Congressional intention to limit the use of intercept procedures and to comply with Fourth Amendment principles. The Ninth Circuit in *United States* v. *Chun*, 503 F.2d 533 (9th Cir. 1974) advocated a three step test to determine whether or not §2518(10)(a)(i) requires suppression for a post-interception failure to comply with statutory requirements:

1. Whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses;
2. whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error;
3. whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby.

See also United States v. *Falcone*, 505 F.2d 478, (3d Cir. 1974).

We believe that the function of the post-interception procedural requirements is to preserve the integrity of the intercepted conversations and to prevent any tampering or editing of the tapes or other unlawful use. While the substantive pre-order requirements are central to the Congressional purpose of limiting the use of wiretapping as an investigative technique, the post interception integrity measures are also important.

As to appellants' claim that suppression was mandated because the tapes were presented to a different judge than

the judge who signed the wiretap order, we find that this is a frivolous argument. The purpose to be served by judicial sealing was accomplished and was no less effective by virtue of the difference of judicial personnel.

We are troubled, however, by the delay of fifty-seven days from the expiration of the interception order to the presentation of the tapes to a judge for sealing. The statute requires that this presentation occur "immediately" and the difference between "immediately" and "fifty-seven days" is not insignificant.[8] We do not assign error to the failure to suppress the tap evidence on this ground because the appellants have not questioned the integrity of the tapes. The purpose of the statute, to insure the integrity of the tapes, thus, was accomplished. The record indicates that the agent had sealed the envelopes containing the tapes immediately after the interceptions and when the tapes were presented to the court the sealed envelopes were placed in boxes which were then sealed. The government has sought to excuse the delay by virtue of Agent Aurilio's travel on other assignments. We find this explanation somewhat untenable when juxtaposed to the government's argument that judges are fungible for purposes of sealing wiretap evidence and we again urge the government to comply with statutory wiretap requirements both pre-interception and post-interception to the fullest extent possible, rather than to continue its unenthusiastic approach for the "technical" requirements demonstrated in this particular case.

Appellants also complain of broken seals on the tape evidence when brought to trial. Again we believe suppression is unwarranted due to the absence of challenge to the integrity of the tapes. The broken seals occurred on the boxes while the seals on the envelopes which were secured by Agent Aurilio remained intact. Although we believe this deviation from the statutory requirement does not warrant suppression absent a challenge to the integrity of the evidence, or an allegation that the government acted deliberately to cause the breaking, the government's explanation that the seals were broken due to their proximity for some time to office air-conditioning - heating system vents is somewhat speculative.

The final post-interception question raised by appellants is the failure of the government to comply with the inventory provisions of Title III requiring the government to provide each of the appellants with a notice of a wiretap order within 90 days of the termination of the surveillance. *See* note 5 *supra*. The defendants did not receive the notice and inventory until April 1974, over two years after termination of the wiretap statute. While this is another example of the nonchalant and careless attitude of the government toward significant Congressionally mandated procedures, we believe that suppression is not required inasmuch as defendants received the inventory three months prior to the hearing on defendants' motion to suppress and furthermore appellants have not alleged any prejudice resulting from this noncompliance. *See United States* v. *Wolk*, 466 F.2d 1143 (8th Cir. 1972). *See also United States* v. *John*, 508 F.2d 1134, 1138-9 (8th Cir. 1975); *United States* v. *Manfredi*, 488 F.2d 588, 602 (2d Cir. 1973) *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Iannelli*, 477 F.2d 999, 1003 (3d Cir. 1973) *affirmed*, 95 S.C. 1284 (1975).

We hold that the wiretap evidence was properly admitted at trial, that defendants were not deprived of the constitutional right to a speedy trial, and that Lawson's trial on this indictment did not subject him to double jeopardy. We affirm the convictions.

FOOTNOTES

[1] Bobbie Arnstein died following the trial and the indictment against her was subsequently dismissed.

[2] 18 U.S.C. §2516(1) provides:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications.

[3] 18 U.S.C. §§2518(1)(b) and (c) provide:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communication sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; . . .

18 U.S.C. §§2518(3)(a), (b), (c) and (d) provide:

> (3) Upon such application the judge may enter an ex parte order as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—
>
> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
>
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

[4] 18 U.S.C. §2518(8)(a) provides:

> . . . Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . .

[5] 18 U.S.C. §2518(8)(d) provides:

> (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extension thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. . . .

[6] Evidence obtained in violation of Title III may not be used according to 18 U.S.C. §2515 which provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this Chapter.

Suppression sanctions for improperly intercepted communications are included in 18 U.S.C. §2518(10)(a):

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval. (not relevant here).

[7] Compare note 2 with §2518(4)(d) which provides as follows:

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; . . .

[8] See also *United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir. 1975).

APPENDIX "B"

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
August 20, 1975
Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD P. MOORE, *Senior Circuit Judge* *
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 74-1982 and 74-1996 *vs.*

GEORGE LAWSON and RONALD SCHARF,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 Cr 243)
DECKER, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

---

* Hon. Leonard P. Moore, Senior Circuit Judge of the U.S. Court of Appeals for the Second Circuit, sitting by designation.

APPENDIX "C"

Corrected

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
October 6, 1975
Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LEONARD P. MOORE, *Senior Circuit Judge* *
Hon. WILBUR F. PELL, JR., *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 74-1982
74-1996

vs.

GEORGE LAWSON and RONALD SCHARF,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois,
Eastern Division.
(74 Cr 243)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

---

* Hon. Leonard P. Moore, Senior Circuit Judge of the U. S. Court of Appeals for the Second Circuit is sitting by designation.

Supreme Court, U. S.
FILED
FEB 10 1976
MICHAEL RODAK, JR., CLERK

No. 75-659 and No. 75-5709

In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE LAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

RONALD SCHARF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-659

GEORGE LAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-5709

RONALD SCHARF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1-16)[1] is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17) was entered on August 20, 1975. A timely petition for rehearing was denied on October 6, 1975 (Pet. App. 18). The petitions for certiorari were filed on November 3, 1975 (Pet. No. 75-659) and November 6, 1975 (Pet. No. 75-5709).[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to comply with various provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510-2520, and, if so, whether suppression of evidence is the appropriate remedy.

2. Whether the application of Circuit Rule 28 of the United States Court of Appeals for the Seventh Circuit, providing for nonpublication of certain written opinions, denied petitioner Scharf any constitutional rights.

3. Whether petitioner Lawson was deprived of his right to a speedy trial.

---

[1] Unless otherwise indicated, all "Pet. App." references are to the appendix in No. 75-659.

[2] Scharf's petition (No. 75-5709) is thus out of time under Rule 22(2) of the Rules of this Court.

4. Whether the dismissal of a prior indictment was "with prejudice" so as to preclude trial of petitioner Lawson on the present indictment.

5. Whether the evidence showed a single conspiracy, as charged in the indictment, or multiple conspiracies.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 (Pet. App. 1-2). Petitioner Lawson was sentenced to ten years' imprisonment, subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by a special parole term of three years. Petitioner Scharf was sentenced to six years' imprisonment, also to be followed by a special parole term of three years (Pet. No. 75-659, p. 13). The court of appeals affirmed in an unpublished opinion (Pet. App. 1-16).

The evidence at trial showed that petitioner Scharf was a purchaser and distributor of cocaine in Chicago. Co-defendant Matthews[3] lived in Florida and had large quantities of cocaine for sale (Pet. App. 2). In August 1971, he sent a sample of the cocaine to Lawson, a resident of Jamaica, and asked whether Lawson knew of any prospective buyers. Lawson

---

[3] Matthews pleaded guilty and testified for the government at the joint trial of Scharf, Lawson and co-defendant Bobbie Arnstein.

said that he did, Matthews gave him an unpublished telephone number, and shortly thereafter Scharf contacted Matthews. In the succeeding weeks both Scharf and Matthews traveled back and forth between Miami and Chicago. Scharf purchased a half-pound of cocaine from Matthews and subsequently sold a quantity of it to a government informant for $6,250 (Pet. App. 2-3). Thereafter, Lawson telephoned Matthews and asked when he could be expected to get paid for the transaction between Matthews and Scharf (Tr. 103).

In November 1971, Scharf arranged for Matthews to sell cocaine directly to the informant. By this time the government had obtained a wire interception order for two telephones listed in the name of Ira Sapstein, Scharf's roommate. Matthews was arrested during the transaction with the informant (Pet. App. 3).

Virtually all of the prosecution's evidence was adduced through the testimony of co-defendant Matthews, who eventually cooperated with the government. In addition the government introduced nine tape recordings of conversations intercepted pursuant to the court-authorized surveillance of Sapstein's telephones. Petitioner Lawson was not a party to any of these conversations, or indeed to any conversation intercepted throughout the period of surveillance. Exhibit 8T consisted of a conversation (on November 22, 1971) between petitioner Scharf and parties not involved in the narcotics conspiracy, in which the subject of cocaine was discussed and Scharf

referred frequently to the "Playboy Mansion." This was introduced primarily to inculpate co-defendant Arnstein, who lived in the Mansion. Exhibits 10T and 11T-1 consisted of conversations on November 17 and 18, 1971, between petitioner Scharf and Arnstein, relating generally to drugs, in which the government argued that code language ("boy" for heroin, "girl" for cocaine) was also used. Exhibits 9T-1, 9T-2, 11T-2, 11T-3, 12T-1, and 12T-2 consisted of conversations on November 16 and 18, 1971, between Scharf, Sapstein, the government informant, and Matthews relating to the informant's trip to Miami to purchase cocaine directly from Matthews.

ARGUMENT

1. Both petitioners assert (Pet. No. 75-659, pp. 25-26; Pet. No. 75-5709, pp. 8-18) that the government failed in numerous respects to comply with certain provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510-2520. Petitioner Lawson, however, has no standing to make this claim. As he concedes (Pet. No. 75-659, pp. 15, 23), he did not participate in any conversation intercepted by the government; indeed, his name was never even mentioned during any of the intercepted conversations. Nor was electronic surveillance ever maintained on any telephone on premises owned or leased by him. He may not, therefore, complain of alleged violations of the statute by the government regarding the interceptions of petitioner Scharf's conversations. *Alderman* v. *United States*, 394 U.S. 165, 176.

As to Scharf, while we acknowledge that some—although not all—of his charges of noncompliance are accurate, we submit that the court below correctly ruled that the noncompliance was not so significant as to warrant suppression.[4] There is no conflict among the circuits on any point raised by petitioners, and the case presents no issues meriting further review.

a. Petitioner Scharf's first contention (Pet. No. 75-5709, pp. 10-13) is that an Acting Assistant Attorney General has no statutory authority to authorize a wire interception and that therefore the order authorizing the interceptions over Sapstein's telephones, signed by Acting Assistant Attorney General Petersen, was void on its face. We submit, on the contrary, that an Acting Assistant Attorney General, when specially designated under 18 U.S.C. 2516(1), may lawfully authorize an application for an intercept order. Cf. *United States* v. *Pellicci*, 504 F.2d 1106 (C.A. 1), certiorari denied, 419 U.S. 1122.[5] But suppression is not required in any event, since, as

[4] Exhibits 11T-2 and 12T-1 are in any case not subject to suppression under Title III, since they were conversations between Scharf and the government informant, and 18 U.S.C. 2511(2)(c) permits interception of a conversation without court order if one of the parties to the communication has given prior consent to the interception.

[5] Review of the same contention was declined in *Vigi* v. *United States*, No. 75-101, certiorari denied October 20, 1975. See also *Joseph* v. *United States*, No. 75-600, *Ganem* v. *United States*, No. 75-611, and *Stanley* v. *United States*, No. 75-762, petitions for writs of certiorari pending, where this issue is also raised.

petitioner concedes (Pet. 12), the Attorney General himself actually authorized the application at issue here; thus it cannot be said that there was a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures * * *." *United States* v. *Giordano*, 416 U.S. 505, 527; *United States* v. *Chavez*, 416 U.S. 562. See also *United States* v. *Acon*, 513 F.2d 513, 516-519 (C.A. 3); *United States* v. *Robertson*, 504 F.2d 289, 291-292 (C.A. 5), certiorari denied, 421 U.S. 913. As the court below correctly ruled (Pet. App. 8), where, as here, the Attorney General personally authorizes the order, "the drastic remedy of suppression is not required where this technical violation occurs and the general purpose of the statute has been preserved."

b. Nor is there any substance to petitioner Scharf's claim (No. 75-5709, pp. 13-14) that the information set forth in the affidavit of the agent in support of the wire interception order (Pet. No. 75-5709, App. G) was insufficient to support the district court's finding of probable cause.

The standard to be applied in determining probable cause for a wire interception order is the same as that applied to determine whether probable cause exists to justify a conventional search warrant. *United States* v. *Armocida*, 515 F.2d 29, 36 (C.A. 3), certiorari denied, No. 74-6683, October 6, 1975; *United States* v. *Falcone*, 505 F.2d 478, 481 (C.A. 3), certiorari denied, 420 U.S. 955. Tested by this traditional standard, the affidavit for the wire inter-

ception order here sufficiently established probable cause to believe that petitioner Scharf was engaged in a cocaine distribution conspiracy and that he used the specified telephones in furtherance thereof. See 18 U.S.C. 2518(3)(a) and (b).

The court below summarized the information contained in the affidavit as follows (Pet. App. 9):

> [The agent's] affidavit set out detailed information garnered from a reliable informant and corroborated by BNDD agents' surveillance and independent investigation. This informant was introduced to Scharf in early September 1971 by a mutual acquaintance for the purpose of obtaining cocaine. According to the agent's affidavit, Scharf told the informant that he could supply unlimited cocaine and he gave Scharf [sic][6] a sample. A week later the informant purchased a half-pound of cocaine from Scharf in a transaction funded and surveilled by BNDD agents who were unable to see the actual transfer. At this time, a telephone relationship between Scharf and the informant was established, and, in response to a suggestion of the informant, Scharf refused to meet the informant's boss. Between September 15 and October 15, Scharf and the informant maintained telephone contact, on one of Sapstein's phones, involving a pending sale of narcotics which included an extra measure to make up for the poorer quality of the first transaction as compared with the sample. Scharf told the informant that his source was a man named George

[6] The affidavit actually states that petitioner provided the informant with the sample (Pet. No. 75-5709, App. G 4).

> in Jamaica. BNDD agents checked the phone records and learned that 23 calls were made from the Sapstein phone to a George Lawson in Jamaica. The informant also told the agents that Scharf was reorganizing his business after November 2, 1971 and later he gave to agents the two new nonpublished numbers which had been installed at the Scharf—Sapstein apartment and which were provided to him by Scharf.

This description demonstrates that the affidavit in support of the wire interception order[7] contained ample information to support a finding of probable cause as to Scharf's continuing narcotics-related activity and his use of the telephones subscribed to by his roommate. Cf. *United States* v. *James*, 494 F.2d 1007, 1015 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020.

c. Petitioners further contend (Pet. No. 75-5709, pp. 14-16; Pet. No. 75-659, pp. 25-26) that the evidence gained from the interceptions should have been suppressed because the government delayed for fifty-seven days in presenting the tapes of the intercepted conversations to the district court for sealing and because the seals on some of the boxes containing the tapes were broken prior to trial.

During the course of the interception period the monitoring agent placed each reel of tape as it was used up in a lock-seal envelope and initialled and dated the envelope over the seal. On November 26, 1971, when the wiretap expired, the agent in charge

[7] The order was issued on November 11, 1971 (Pet. App. 8).

took personal custody of the envelopes and placed them in a locked filing cabinet in the office of the Bureau of Narcotics and Dangerous Drugs.

On January 21, 1972, the agent removed the envelopes and took them to District Judge Austin's chambers[8] where they were placed in three boxes and sealed. Thereafter the boxes were kept either in the agent's office or in an evidence vault at the BNDD offices. Although the seals of two of the boxes were found to have been broken before trial, the agents who initially sealed the tapes in the locked envelopes testified that the envelopes were still in the same sealed condition they had been in when first sealed (Tr. 745, 751, 780, 788, 790).

Although the delay in presenting the tapes to the district court amounted to a failure to comply with the directive of 18 U.S.C. 2518(8)(a) that such tapes be presented "[i]mmediately," the court below properly determined that suppression was not warranted. As we argued in our brief in opposition in *Berger* v. *United States* and *Falcone* v. *United States*, Nos. 74-5500 and 74-5619, certiorari denied, 420 U.S. 955,[9] the interpretation of Section 2518(8)(a)

[8] Chief Judge Robson had authorized the wire interception, but we agree with the court below that the government's "failure" to present the tapes to the district court judge who initially authorized the interception did not amount to a noncompliance with Title III warranting suppression. As the court ruled (Pet. App. 12), "[t]he purpose to be served by judicial sealing was accomplished and was no less effective by virtue of the difference of judicial personnel."

[9] We are sending each petitioner's counsel a copy of that brief.

is not an issue warranting review by this Court. There is no conflict among the circuits, and the meaning of the statute is plain enough without judicial construction to provide guidance to law enforcement officials. Furthermore, as we explained in *Berger* and *Falcone*, *supra*, the Department of Justice has, since the date of the interceptions in that case (and this case as well), instituted particularized procedures to remind officials of the various steps necessary upon discontinuation of an interception, and we expect that this system will prevent similar delays from occurring in the future.[10]

In any event, suppression was not required. *United States* v. *Chavez*, 416 U.S. 562, 574-575, established that suppression under Section 2518(10)(a)(i) is appropriate only for violations that involve " 'statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device' ", (*id.* at 575, quoting *United States* v. *Giordano*, 416 U.S. 505, 527). Failure to seal the tapes immediately is not such a violation of

[10] On the date each authorization expires, a "tickler" system signals an attorney in the Special Operations Unit of the Department to telephone the supervising attorney in the field to remind him of the expiration and of his duties under the statute, including the immediate sealing requirement. In addition, on February 11, 1975, the Chief of the Organized Crime and Racketeering Section of the Department sent a special bulletin to the attorneys in charge of all strike forces and field offices reminding those attorneys and their staffs of the obligation to present tapes immediately for sealing.

the statute; it can have no effect on the decision to use intercept procedures. None of the important interests identified in *Chavez* or *Giordano* is implicated in this case. To the extent that the purpose of the sealing requirements is to assure the integrity of the tapes (see *United States* v. *Sklaroff*, 506 F.2d 837, 840 (C.A. 5), certiorari denied, No. 74-1249, October 6, 1975; *United States* v. *Falcone*, 505 F.2d 478, 484 (C.A. 3), certiorari denied, 420 U.S. 955), that purpose can be met in ways other than suppression. Immediate sealing is preferable because it eliminates any doubts about the integrity and confidentiality of the tapes and eliminates the need for an inquiry by the court, but we submit that the proper procedure when the tapes are not immediately sealed is to require the government, as a condition of the admissibility of the tapes, to demonstrate that it has preserved the integrity and the confidentiality of the tapes and thereby fulfilled the purpose of the immediate sealing requirement.

The government met that burden in this case by showing at a pretrial hearing and at trial that it took proper and sufficient steps through the use of the lock-seal envelopes to assure the integrity of the tapes. Moreover, as the court of appeals noted (Pet. App. 13), petitioners have never challenged the integrity of the tapes or suggested that the government acted out of improper motive in delaying the presentation for sealing, or that any advantage to the government or prejudice to petitioners has resulted from the delay. In short, no statutory purpose was frustrated, and suppression was not warranted.

Petitioners have similarly never claimed that the seals were broken due to any connivance or misbehavior by government officials, and although the court of appeals found the government's proffered explanation for the broken seals "somewhat speculative" (Pet. App. 13),[11] this was necessarily a finding that the explanation was "satisfactory" for the purposes of Section 2518(8)(a), since the court held that the tapes were admissible. There is no need for further review of this essentially factual situation, especially absent any indication of bad motive or conscious wrongdoing on the part of the government officials involved.

d. Petitioners did not receive notice and inventory of the wire interception until April 1974, which was two years after its termination (but three months prior to the filing of their motions to suppress) (Pet. App. 13). They assert (Pet. No. 75-659, p. 26; No. 75-5709, pp. 16-17) that suppression of the tapes is mandated by the failure to have the inventory served on them within 90 days, as provided for in 18 U.S.C. 2518(8)(d). But petitioners have not demonstrated any prejudice whatever resulting from the delay, and accordingly the court of appeals correctly

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[11] The government has never pretended to know for certain how the seals were broken, except that they were not knowingly broken by any government official. The explanation which seemed most plausible to the agent to whose custody the sealed boxes were committed was that the seals became broken due to their proximity to the office air-conditioning-heating system vents.

determined (Pet. App. 13) that suppression was unnecessary.

The intent of Section 2518(8)(d) is that "all authorized interceptions must *eventually* become known at least to the subject." S. Rep. No. 1097, 90th Cong., 2d Sess., p. 105 (1968) (emphasis added). We submit that (at least absent any indication of repeated violations by the government that might arguably warrant suppression as a deterrent) noncompliance with the 90-day provision does not automatically require suppression; rather, some showing of actual prejudice is necessary. *United States* v. *Rizzo*, 492 F.2d 443, 447 (C.A. 2), certiorari denied, 417 U.S. 944. This has been held to be the rule even where the inventory was never filed, yet actual notice was received. *United States* v. *Iannelli*, 477 F.2d 999, 1003 (C.A. 3), affirmed on other grounds, 420 U.S. 770. Accordingly, since petitioners have neither alleged nor demonstrated prejudice by the delay in the present case, further review of the decision of the court below on this issue is not merited.[12]

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[12] In *United States* v. *Donovan*, No. 75-212, petition for a writ of certiorari pending, the government has sought review of the court of appeals' ruling (513 F.2d 337 (C.A. 6)) that evidence must automatically be suppressed as to any person whose conversations were overheard but who did not receive notice of the interceptions. There is no reason to hold the instant case pending action on that petition since, unlike in *Donovan*, petitioners here actually received notice of the interception and the only question is whether tardy notice requires suppression without a showing of prejudice by petitioners. There is no conflict among the circuits on that question.

e. Petitioner Scharf's final attack on the wire interception (Pet. No. 75-5709, p. 17) consists of his claim that the agent's affidavit (Pet. No. 75-5709, App. G) failed to set forth sufficient facts to satisfy the requirements of 18 U.S.C. 2518(1)(c) and (3)(c) that a finding be made that other normal investigative procedures were first tried or appeared unlikely to succeed if tried.

We have recently discussed the requirements of Section 2518(1)(c) and (3)(c) in our brief in *Anderson* v. *United States*, No. 75-500, petition for a writ of certiorari pending, to which we respectfully refer the Court (and a copy of which we are sending each of petitioner's counsel). To repeat briefly our argument more fully developed therein, the statutory requirement that normal investigative procedures be first exhausted must be reviewed in a practical and common sense fashion. *United States* v. *James*, *supra*, 494 F.2d at 1015-1016; S. Rep. No. 1097, *supra*, at 101. The requirement of Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. The statute does not require that normal means of investigation must, in fact, actually be tried, but only that they be tried if likely to succeed. *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F.2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

In the present case the authorizing judge properly found that normal investigative procedures were inadequate. As the court of appeals noted (Pet. App. 10):

> In this instance it was clear from the agent's affidavit that other investigatory techniques were inadequate inasmuch as surveillance had not been totally successful and since Scharf had exhibited such reluctance to meet with the informer's boss. Furthermore, in view of the fact that Scharf's source was in Jamaica, wiretapping was the only feasible means suitable to determine delivery techniques, times, and places.

Moreover, the affidavit (Pet. No. 75-5709, App. G) showed that prior to the wire interception application a two-month investigation of the narcotics distribution conspiracy had been conducted through the use of surveillance and an informant.[13] However, the extent of that conspiracy, the identity of the partici-

[13] This distinguishes this case factually from the recent decision of a panel of the Ninth Circuit in *United States* v. *Kalustian*, No. 74-3314, decided August 4, 1975, opinion amended, December 11, 1975. While the changes in the opinion in *Kalustian* somewhat moderate the disparities between it and virtually all other appellate decisions to consider this issue, it remains inconsistent with decisions of other panels of the Ninth Circuit, and we have petitioned for a rehearing *en banc*. We discuss that case at greater length in our brief in *Anderson, supra*. This case is not in any event a proper vehicle for this Court to consider the issues raised in *Kalustian* since, unlike the situation there, numerous normal investigatory procedures were utilized and the court was informed of that fact.

pants, and their precise means of accomplishing its objectives (*e.g.*, time, place and manner of importation and distribution) could not be discovered through normal means due to the source's location in Jamaica and petitioner's wariness, as evidenced by his refusal to deal with the informant's "boss." See *United States* v. *James, supra*, 494 F.2d at 1016. Thus, the finding of the courts below that normal investigative procedures had been unsuccessfully tried and appeared unlikely to succeed if continued was correct and merits no further review.

2. Petitioner Scharf contends (Pet. No. 75-5709, pp. 19-20) that Circuit Rule 28 of the United States Court of Appeals for the Seventh Circuit,[14] providing for written orders to be designated as "unpublished" (as was the order in the present case), is unconstitutional.

An appellate court is not constitutionally required to write any opinion at all in disposing of an appeal (see *National Labor Relations Board* v. *Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L. 990*, 430 F.2d 966, 971-972 (C.A. 5)), and it follows that if it does write an opinion it may deny publication. Whatever the merits of a contrary argument when presented by a party seeking to rely on an unpublished order of an appellate court (see Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Jus-*

[14] Circuit Rule 28 declares that its policy is to "reduce the proliferation of published opinions." Cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195, n. 4.

tice?, 61 A.B.A.J. 1224 (1975)), petitioner has not demonstrated how Circuit Rule 28 has denied him his constitutional rights or prejudiced him in any way. At most he seeks to litigate the question whether Circuit Rule 28 may work some sort of harm to a hypothetical future litigant; this contention fails to establish that petitioner himself has suffered " 'some threatened or actual injury' " giving him " 'such a personal stake in the outcome of the controversy' " as to confer standing on him to raise this issue. *Warth* v. *Seldin*, 422 U.S. 490, 498, 499.

3. The court of appeals, in an opinion on which we rely, properly held that petitioner Lawson was not deprived of a speedy trial (Pet. App. 4-5). As the court noted, trial of the original indictment was postponed because the government's chief witness had disappeared. On petitioner's demand for immediate trial, the government moved to dismiss the indictment. After the witness was located, a second indictment was returned in March 1974, and trial commenced in October 1974. It is only this latter seven-month delay of which Lawson can reasonably complain; absent a showing of prejudice (which he does not make), he received any remedy to which he may have been entitled for delay of trial of the first indictment when that indictment was dismissed. The delay between locating the witness and the return of the second indictment was justified because the witness gave further information that necessitated additional investigation. Furthermore, over half of the seven-month delay after return of the second indictment was occasioned by various pretrial motions filed by the defense. The remaining three-month delay was necessary to settle upon a convenient trial date for what was predicted to be a lengthy trial. In these circumstances, and without a particularized showing of any harm to petitioner, the principles of *Barker* v. *Wingo*, 407 U.S. 514, have not been transgressed.

4. The petition on its face contradicts Lawson's assertion (Pet. No. 75-659, pp. 29-31) that dismissal of the first indictment was understood by himself, the district court, and the government to be a dismissal with prejudice. Lawson sought a dismissal with prejudice to preclude reindictment, but the government objected, arguing that the question should be settled only in the event that the government did reindict. The court then stated its belief that it could not prevent the government from dismissing the first indictment, and Lawson's counsel replied that he did not in fact want the court to prevent the dismissal. Nothing in the colloquy (see Pet. No. 75-659, p. 30) supports petitioner's contention that "the clear import to all the parties including the Court was that the dismissal * * * was 'with prejudice.' " Furthermore, a dismissal for failure to prosecute is ordinarily without prejudice (*e.g.*, *United States* v. *Davis*, 487 F.2d 112, 118 (C.A. 5), certiorari denied, 415 U.S. 981; *DeMarrias* v. *United States*, 487 F.2d 19, 21 (C.A. 8), certiorari denied, 415 U.S. 980; *United States* v. *Clay*, 481 F.2d 133, 135 (C.A. 7), certiorari denied, 414 U.S. 1009), and this should be particu-

larly true when the failure is the result of the unavailability of a key witness.

5. Finally, there is no merit to Lawson's claim (Pet. No. 75-659, pp. 26-29) that the evidence showed multiple conspiracies. As shown in the statement, *supra*, pp. 3-5, the evidence showed a single conspiracy to distribute cocaine, which Lawson helped to initiate by acting as the intermediary who brought the other parties together, an action for which, as the evidence shows, he expected and sought compensation out of the proceeds of the distribution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

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